STATE OF MICHIGAN

IN THE SUPREME COURT

SUE H. APSEY and ROBERT APSEY, JR.,
Appellee/Cross-
Plaintiffs-Appellants,

Supreme Court No. _____

-vs-

Court of Appeals No. 251110

~~THE~~ MEMORIAL HOSPITAL, ~~a Michigan Non-Profit Corporation~~ d/b/a MEMORIAL HEALTHCARE CENTER, RUSSELL H. TOBE, D.O., JAMES H. DEERING, D.O., and JAMES H. DEERING, D.O., P.C., d/b/a SHIAWASSEE RADIOLOGY CONSULTANTS, P.C., ~~Jointly and Severally,~~

Lower Court No. 01-007289-NH

OK

Defendants-Appellees.

and _____/
Defendant-Appellant/Cross Appellee

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NOTICE OF HEARING

PLAINTIFF-APPELLANT'S CROSS-APPLICATION FOR LEAVE TO APPEAL

PROOF OF SERVICE

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ORDER BEING APPEALED FROM AND RELIEF REQUESTED

Plaintiffs-Appellants seek leave to appeal from the Court of Appeals' published decision dated June 9, 2005. A copy of that Opinion is attached hereto as Exhibit D. In that opinion a two person majority in the Court of Appeals concluded that the affidavits of merit which were submitted by the plaintiffs were defective because, although signed under seal by a notary public in the State of Pennsylvania, the authority of the notary had to be further certified under a Michigan statute, MCL 600.2102.

Plaintiffs would request that this Court grant leave to appeal and give full consideration to the important legal issues raised in this case. In the alternative, plaintiffs would request that this Court summarily reverse the Court of Appeals' determination that plaintiff's affidavits had to have an additional certification and remand this case to the Shiawassee County Circuit Court for further proceedings.

STATEMENT OF QUESTIONS PRESENTED

I. SHOULD THIS COURT GRANT LEAVE TO APPEAL TO CONSIDER THE QUESTION OF WHETHER THE COURT OF APPEALS ERRED IN CONCLUDING THAT AN AFFIDAVIT SIGNED IN ANOTHER STATE WOULD NOT BE RECOGNIZED IN A MICHIGAN COURT PROCEEDING UNLESS THAT AFFIDAVIT IS BOTH SIGNED BY A NOTARY PUBLIC AND AN ADDITIONAL CERTIFICATION OF THE AUTHORITY OF THE NOTARY PUBLIC IS PROVIDED?

Plaintiffs-Appellants say "Yes".

Defendants-Appellees say "No".

II. SHOULD THIS COURT SHOULD GRANT LEAVE TO APPEAL TO CONSIDER THE QUESTION OF WHETHER, ASSUMING *ARGUENDO* THAT THERE WAS A CONFLICT BETWEEN THE UNIFORM RECOGNITION OF ACKNOWLEDGMENTS ACT, MCL 565.261, *et seq.* AND MCL 600.2102, THE COURT OF APPEALS ERRED IN THE MANNER IN WHICH IT RESOLVED THAT CONFLICT?

Plaintiffs-Appellants says "Yes".

Defendants-Appellees says "No".

III. SHOULD THIS COURT REVIEW THE QUESTION OF WHETHER THE COURT OF APPEALS ERRED IN CONCLUDING THAT THE SANCTION FOR A PARTY'S FAILURE TO OBTAIN THE ADDITIONAL CERTIFICATION CALLED FOR BY MCL 600.2102 ON AN AFFIDAVIT OF MERIT SIGNED OUTSIDE THE STATE OF MICHIGAN IS THE DISMISSAL OF THE CASE WITH PREJUDICE, WITHOUT RECOURSE TO THE TOLLING PROVISION CONTAINED IN MCL 600.5856(a)?

Plaintiffs-Appellants says "Yes".

Defendants-Appellees says "No".

STATEMENT OF MATERIAL PROCEEDINGS AND FACTS

On January 7, 2000, Sue H. Apsey was admitted to Memorial Healthcare Center (hereinafter: "Memorial") for an exploratory laparotomy. (First Amended Complaint, ¶9). When Mrs. Apsey experienced some amount of difficulty following the surgery, she underwent a CT scan. This CT scan, which was performed on January 11, 2000, was interpreted by a radiologist at Memorial, Dr. James Deering.

Dr. Deering concluded that the CT scan showed hypodyanic loops, but showed no fluid in the abdomen. (First Amended Complaint, ¶12). Dr. Deering's interpretation of the January 11, 2000 CT-scan was incorrect. That study showed a considerable collection of fluid, making the study highly suspicious for a pelvic abscess. (*Id.*, ¶13).

Four days later Mrs. Apsey underwent a second CT scan and a small bowel series. These studies were interpreted by another radiologist, Dr. Russell Tobe. Dr. Tobe correctly identified fluid in Mrs. Apsey's pelvis from the CT scan result. (*Id.*, ¶15). Dr. Tobe also concluded on the basis of the small bowel series that there was evidence of a bowel perforation. (*Id.*, ¶16), Unfortunately, Dr. Tobe's findings were not reported to Mrs. Apsey's surgeon until two days later, on January 17, 2000.

In the four days after the results of the January 15, 2000 studies were finally communicated to Mrs. Apsey's surgeon, she had to undergo two surgeries to repair the perforation and to treat the considerable sepsis which had developed.

On January 26, 2000, Mrs. Apsey was transferred to the University of Michigan Hospital where a considerable portion of her small bowel had to be resected.

On November 7, 2001, Mrs. Apsey and her husband, Robert Apsey, Jr., filed this action in the Shiawasee County Circuit Court. Originally named as defendants in the case were Memorial and Dr. Tobe. With that Complaint, plaintiffs filed an Affidavit of Merit signed by Dr. Seth N. Glick. Attached hereto as Exhibit A is a copy of Dr. Glick's Affidavit of Merit. Dr. Glick is a radiologist licensed to practice medicine in the State of Pennsylvania. Dr. Glick's Affidavit was signed before Samaya Nicole Brown, a notary public in Montgomery County, Pennsylvania. Ms. Brown signed Dr. Glick's affidavit and she affixed a notarial seal to the document. Affidavit (Exhibit A), p. 3.

Several months later, plaintiffs were allowed to file a First Amended Complaint adding as defendants a second radiologist, Dr. Deering, and Dr. Deering's professional corporation. When plaintiffs' First Amended Complaint was filed on February 8, 2002, it was accompanied by another affidavit signed by Dr. Glick. Attached hereto as Exhibit B is a copy of that affidavit. This second affidavit was notarized by a Pennsylvania notary public, Liza Nichols, and the document was stamped with Ms. Nichols' seal. Affidavit (Exhibit B), p. 4.

In June 2003, Dr. Deering and his corporation filed a motion for summary disposition. In that motion, the defendants argued that because Dr. Glick's affidavit of merit was signed outside the State of Michigan, that affidavit was defective in that it did not contain a separate certification of the notary's authority. The defendants argued that this additional certification was required under a Michigan statute, MCL 600.2102.

Plaintiff countered this argument in the circuit court by citing another Michigan statute, the Uniform Recognition of Acknowledgments Act, MCL 565.261, *et seq*, which provides that

no additional certification is required for an affidavit signed in another state where that affidavit is attested to by a notary public.

The circuit court granted the defendants motions for summary disposition and plaintiff appealed the judgment to the Michigan Court of Appeals.

Following briefing and oral argument, a panel of the Court of Appeals issued an Opinion in this matter on April 19, 2005, affirming the grant of summary disposition to the defendants. A copy of the Court of Appeals' April 19, 2005 decision is attached hereto as Exhibit C. In reaching this result, the Court of Appeals acknowledged that the Uniform Recognition of Acknowledgments Act (URAA) does not require an additional certification of the notary's authority. As such, the Court ruled that, "If the present inquiry were to be decided based on the URAA, the notarization of the affidavit in question would indisputably be valid." Opinion (Exhibit C), p. 3. Despite this ruling, the Court of Appeals held that MCL 600.2102 would control this case, rendering plaintiffs' affidavits defective because plaintiffs did not supply the additional certification of the notary's authority called for by that statute.

The panel further ruled that, based on the Court of Appeals' prior decision in *Geralds v Munson Healthcare*, 259 Mich App 225; 673 NW2d 792 (2003), any defect in the affidavit of merit had to result in the dismissal of the case with prejudice. Opinion (Exhibit C), pp. 4-5.

Plaintiffs filed a timely motion for reconsideration. In that motion, plaintiffs pointed out that the Court had failed to address the most significant provision of the URAA for purposes of the arguments being raised herein, MCL 565.268. That provision explicitly states that the recognition of out-of-state acknowledgments provided in the URAA is designed to be in addition to any other method of validating acknowledgments provided by law in this state.

On June 2, 2005, the Court of Appeals issued an order vacating its April 19, 2005 decision. Seven days later, the Court issued an Opinion on reconsideration. A copy of the Court's June 9, 2005 Opinion is attached hereto as Exhibit D. In that Opinion, a two person majority of the Court adhered to the holding reached in the Court's April 19, 2005 decision, concluding that an affidavit of merit signed outside the State of Michigan is defective unless the authority of the notary is subject to an additional certification.

In arriving at this result, the majority opinion again confirmed that the URAA expressly declared that an additional certification of the notary's authority is not required and that, under the URAA, it would have been compelled to reverse:

> *If the present inquiry were to be decided based on the URAA, the notarization of the affidavit in question would indisputably be valid.* Plaintiffs' affidavit of merit bears the signature and notary seal of a Pennsylvania notary public. That status in another state carries over to this state, and the signature and title are prima facie evidence of authenticity, MCL 565.263(4).
>
> Opinion (Exhibit D), p. 3 (emphasis added).

What remained for the Court of Appeals to decide was whether this case was governed by the URAA, which specifies that no additional certification is necessary, or by MCL 600.2102, which requires such certification. The majority Opinion observed that its initial function in addressing this issue was to attempt to harmonize these two statutes. The Court's majority found that the two statutes could be harmonized based on the following analysis:

> The two statutes can be harmonized. The URAA provides in pertinent part, "Nothing in this act diminishes or invalidates the recognition accorded to notarial acts by other laws of this state." MCL 565.268. The Legislature is charged with knowledge of existing laws on the same subject and is presumed to have considered the effect of new laws on all existing laws. *Walen v*

Dep't of Corrections, 443 Mich 240, 248; 505 NW2d 519 (1993); *Kalamazoo v KTS Industries, Inc.*, 263 Mich App 23, 34; 687 NW2d 319 (2004). MCL 600.2102 is a law of this state that requires more specific recognition requirements of notarial acts authenticating an affidavit of a person residing in another state that is received in judicial proceedings; *i.e.*, it requires that the signature of a notary public on an affidavit taken out of state "be certified by the clerk of any court of record in the county where such affidavit shall be taken, under seal of said court." As such, the URAA, enacted after MCL 600.2102, does not diminish or invalidate the more specific and more formal requirements of MCL 600.2102. Furthermore, this harmonious application of the URAA and MCL 600.2102 avoids conflict. *See House Speaker, supra* at 568-569; *Travelers Ins, supra* at 280.

For these reasons, we find that the more specific requirements of MCL 600.2102 of the Revised Judicature Act control over the general requirements of MCL 565.262 of the URAA. *See Antrim, supra* at 484, *citing Gebhardt, supra* at 542-543. In other words, MCL 565.262 governs notarial acts, including the execution of affidavits, in general, to which MCL 600.2102 adds a special certification requirement when the affidavit is to be read, meaning officially received and considered, by the judiciary. This special certification requirement of MCL 600.2102 is not diminished or invalidated by the subsequently enacted URAA. *See* MCL 565.268. Instead, MCL 565.268 allows for the statutes to be harmonized. As such, the special certification is a necessary part of an affidavit submitted to the court to meet the requirement of MCL 600.2912d(1).

Opinion (Exhibit D), pp. 4-5.

The majority opinion reaffirmed the conclusion which it reached in its April 19, 2005, decision regarding the disposition of the case based on the defect which it found in plaintiffs' affidavit of merit. The majority determined that the appropriate sanction for filing an affidavit of merit without the additional certification of the notary's authority was the outright dismissal of the case. Opinion (Exhibit D), p. 6.

The majority, however, refused to give this aspect of its opinion full retrospective effect. It held, instead, that, because of "the apparent reliance on the URAA by the legal community", cases filed before the date of its opinion would be allowed to comply with the requirements of MCL 600.2102 by filing the certification called for by that statute. Opinion (Exhibit D), pp. 7-9.

Judge Mark Cavanaugh issued a dissenting opinion in which he disagreed with the majority's conclusion that the URAA did not apply. In that dissent, Judge Cavanaugh relied on the text of section 8 of the URAA, MCL 565.268, to construe the URAA and MCL 600.2102 in harmony.

> The statute in dispute, MCL 600.2102, provides a method of authenticating notarial acts, *i.e.*, proving that a notary public actually notarized the document. MCL 600.2102(4) states that "[t]he signature of such notary public . . . and the fact that at the time of the taking of such affidavit the person before whom the same was taken was such notary public . . . shall be certified by the clerk of any court of record in the county where such affidavit shall be taken, under the seal of said court." . . .
>
> *The URAA, however, explicitly states that it is "an additional method of proving notarial acts."* MCL 565.268. And, MCL 565.263(4) provides that the signature and title of the notary public are prima facie evidence that he or she is a notary public and that his or her signature is genuine. *That is, it is another method of proving that a notary public actually notarized the document and it does not require a clerk of a court to perform the authenticating function.*
>
> Opinion (Exhibit D), p. 2 (J. Cavanaugh dissenting).

ARGUMENT

I. THE COURT SHOULD REVIEW AND REVERSE THE COURT OF APPEALS' DETERMINATION THAT MCL 600.2102 ALONE GOVERNS THE AUTHENTICATION OF AN AFFIDAVIT SIGNED OUTSIDE THE STATE OF MICHIGAN WHICH IS USED IN A MICHIGAN COURT PROCEEDING.

The Court of Appeals ruled in this case that an affidavit signed outside the State of Michigan may only be used in a judicial proceeding in this state if it contains both the signature of a notary and a separate certification of the notary's authority. The Court of Appeals arrived at this result on the basis of a Michigan statute which has been in existence since 1879. The Court reached this conclusion despite the Michigan Legislature's adoption in 1969 of a uniform act, the URAA, which is designed to apply to *all* notarial acts performed outside this state and which explicitly does *not* require the additional certification imposed by the majority herein. This brief will demonstrate that the Court of Appeals majority patently erred in its approach to the issues presented herein.

Plaintiffs would stress that, despite the seemingly limited character of the dispute involved herein, the Court of Appeals' decision in this case has already had enormous impact on medical malpractice litigation in this state and will, unless addressed by this Court, continue to have significant ramifications in any area of the law in which out-of-state acknowledgments are employed in Michigan courts.

Because of the importance this legal issue and because of the enormity of the legal error committed by the Court of Appeals' majority in arriving at its decision, plaintiffs would ask this Court to review and reverse that decision.

A. A Brief History Of Michigan's Statutory Treatment Of Affidavits Signed Outside This State.

Before turning to the Court of Appeals' ruling in this case, it is important that the Court have some grasp of the history of Michigan's statutory treatment of affidavits which are signed outside this state and used in a Michigan court proceeding.

The Michigan Legislature first passed a statute pertaining to the use of affidavits signed by persons residing in another state or in a foreign country in 1846. RS 1846, c. 102, §33. That statute provided that an affidavit signed outside the State of Michigan either had to be taken before a person duly appointed and commissioned by the governor of Michigan or it had to be authenticated by a judge of a court and the genuineness of the judge's signature had to be further certified by the clerk of the court under seal.[1]

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[1]RS 1846, c. 102, §33 provided:

> In cases where by law the affidavit of any person residing in another state of the United States, or in any foreign country, is required, or may be received in judicial proceedings in this state, to entitled the same to be read, it must be authenticated as follows:
>
> 1. It must be certified by some judge of a court having a seal, to have been taken and subscribed before him, specifying the time and place where taken:
>
> 2. The genuineness of the signature of such judge, the existence of the court, and the fact that such judge is a member thereof, must be certified by the clerk of the court, under the seal thereof: or,
>
> 3. If such affidavit be taken in any other of the United States, or any territory thereof, it may be taken before a commissioner duly appointed and commissioned by the governor of this state to take affidavits to be used therein.

(continued...)

The law pertaining to affidavits signed by non-residents was to remain unchanged for over thirty years. *See* CL 1857, §4259; CL 1871, §5879. In 1879, the Michigan Legislature passed a statute which for the first time provided for the recognition in Michigan courts of affidavits signed outside the State of Michigan before a notary public. Public Act 1879, No. 147 provided:

> In cases where by law the affidavit of any person residing in another state of the United States, or in any foreign country, is required, or may be received in judicial proceedings in this state, to entitle the same to be read, it must be authenticated as follows:
>
> *First*, It must be certified by some judge of a court having a seal, to have been taken and subscribed before him, specifying the time and place where taken;
>
> *Second*, The genuineness of the signature of such judge, the existence of the court, and the fact that such judge is a member thereof, must be certified by the clerk of the court, under the seal thereof; or,
>
> *Third*, If such affidavit be taken in any other of the United States or in any territory thereof, it may be taken before a commissioner duly appointed and commissioned by the governor of this state to take affidavits therein, *or before any notary public or justice of the peace authorized by the laws of such state to administer oaths therein. The signature of such notary public or justice of the peace, and the fact that at the time of the taking of such affidavit the person before whom the same was taken was such notary public or justice of the peace, shall be certified by the clerk of any court of record in the county where such affidavit shall be taken, under the seal of said court.*

The third section of PA 1879, No. 147 authorized out-of-state affidavits to be signed before a notary public commissioned under the laws of the state where the affidavit was

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[1](...continued)

executed. That Act, however, provided that such an affidavit had to be accompanied by the certification from the clerk of any court of record in the county where the affidavit was executed, attesting to the fact that the person notarizing the affidavit was, in fact, a notary.

The language of P.A. 1879, No. 147 was construed by this Court in *Berkery v Reilly*, 82 Mich 160; 46 NW 436 (1890). In that case, the Court ruled that an affidavit signed and notarized in Ohio could not be used in a Michigan court because it did not also have the certification required by P.A. 1879, No. 147.

The certification requirement first provided in 1879 remains a part of Michigan law. The statutory requirement has been recodified over time, *see* How §7448; CL 1897; §10144; CL 1915, §12502; CL 1929, §14168; CL 1948, §617.14, but the pertinent text of this statute has remained virtually the same since 1879.[2] At present, the statute which requires the certification of a notary who executes an affidavit signed outside the State of Michigan is MCL 600.2102, which provides in relevant part:

> In cases where by law the affidavit of any person residing in another state of the United States, or in any foreign country, is required, or may be received in judicial proceedings in this state, to entitle the same to be read, it must be authenticated as follows:
>
> * * *
>
> (4) If such affidavit be taken in any other of the United States or in any territory thereof, it may be taken before a commissioner duly appointed and commissioned by the governor of this state to take affidavits therein, or before any notary public or justice of the peace authorized by the laws of such state to administer oaths

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[2]The statute was amended in 1909, P.A. 1909, No. 191, to include another subsection pertaining to affidavits signed in foreign countries. But the text of the final subsection of the law, the subsection at issue herein, was not changed by that amendment.

> therein. The signature of such notary public or justice of the peace, and the fact that at the time of the taking of such affidavit the person before whom the same was taken was such notary public or justice of the peace, shall be certified by the clerk of any court of record in the county where such affidavit shall be taken, under the seal of said court.
>
> MCL 600.2102(4).

While Michigan has since 1879 had a statute which requires the certification of a notary who signs an affidavit executed outside this state, for over 100 years it has also had a statute which provides that no such certification is necessary.

Early in its existence, the National Conference of Commissioners on Uniform State Laws saw a need for uniformity among the states with respect to the authentication of affidavits executed in another state or a foreign country. In 1892, the Commissioners on Uniform State Laws proposed the first of what was to be a number of proposed laws governing this topic. The first of the uniform acts proposed by the Commissioners was the 1892 Uniform Acknowledgment Act.

In 1895 Michigan became one of the first states to adopt the Uniform Acknowledgment Act in P.A. 1895, No. 185. That statute began with a statement indicating that the forms of acknowledgment being authorized therein were designed to be in addition to any other forms previously established in this state. Thus, section 1 of the Uniform Acknowledgment Act and PA 1895, No. 185 provided: "That either the forms of acknowledgment now in use in this State, or the following, may be used in the case of conveyance or other written instruments, whenever such acknowledgment is required or authorized by law for any purpose." *Id.*, §1.

Section 3 of P.A., 1895, No. 185 provided the circumstances in which a written instrument executed outside the State of Michigan could be read into evidence in a Michigan court:

> The proof of acknowledgment of any deed or other written instrument required to be proved or acknowledged in order to entitle the same to be recorded or read in evidence, when made by any person without this State and within any other state, territory or district of the United State may be made before any officer of such state, territory or district authorized by the laws thereof to take the proof and acknowledgment of deeds, and when so taken and certified as herein provided, shall be entitled to be recorded in this State, and may be read in evidence in the same manner and with like effect as proofs and acknowledgments taken before any of the officers now authorized by law to take such proofs and acknowledgments, and whose authority so to do is not intended to be hereby affected.

Section 3 of PA 1895, No. 185, specifically indicated that receipt into evidence was conditioned on an affidavit being "taken and certified as herein provided." The circumstances under which the document would be deemed certified under the Uniform Acknowledgments Act and P.A., 1895, No. 185 was provided in section 4 of that act, which stated:

> To entitle any conveyance or written instrument, acknowledged or proved under the preceding section to be read in evidence or recorded in this state, there shall be subjoined or attached to the certificate of proof or acknowledgment, signed by such officer, a certificate of the secretary of state of the state or territory in which such officer resides under the seal of such state or territory, or a certificate of the clerk of a court or record of such state, territory or district in the county in which said officer resides or in which he took such proof of acknowledgment under the seal of such court stating that such officer was at the time of taking such proof or acknowledgment duly authorized to take acknowledgments and proofs of deeds of lands in said state, territory or district, and that said secretary of state or clerk of court is well acquainted with the handwriting of such officer, and that he verily believes that the signature affixed to such certificate of proof or acknowledgment is

> genuine ***unless such acknowledgment be taken before a notary public who certifies thereto under his seal of office, when such conveyance or written instrument may be read in evidence or recorded without such certificate.***"
>
> P.A., 1895, No. 185, §4 (emphasis added).

The final sentence of section 4 of P.A. 1895, No. 185 contained one of the significant reforms provided in the Uniform Acknowledgments Act. That act called for an additional certification of the qualifications of the officer before whom the affidavit was signed *unless* that affidavit was signed in another state or territory before a notary public, "who certifies thereto under his seal of office.

The significance of the Michigan Legislature's 1895 adoption of the Uniform Acknowledgment Act was addressed by this Court in *Reid v Rylander*, 270 Mich 263; 258 NW 630 (1935). The defendants in *Reid* argued that an affidavit notarized by a New York notary was a nullity because it did not include a certification signed by a court clerk. On the basis of Michigan's adoption of the Uniform Acknowledgment Act, which was then codified in CL 1929, §13333, this Court held in *Reid* that certification by the clerk of a court was not necessary if the written instrument was taken before an out-of-state notary public under his seal of office:

> Defendants also attack the certificate of the New York notary on the ground that his official character was not certified by the clerk of a court of record. It was sufficient for the officer taking the acknowledgment to attach thereto the seal of his office. See C.L. 1929, sec 13333"
>
> 270 Mich at 268 (emphasis added).

Thus, in 1935, this Court recognized that with the adoption of the Uniform Acknowledgments Act, the Michigan Legislature had eliminated the requirement of filing a separate certification with an affidavit when an out-of-state notary public affixed his seal to the instrument.

The Court was to return to this same question twelve years later in *Sipes v McGhee*, 316 Mich 614; 25 NW2d 638 (1947), *rev'd on other grounds sub nom Shelly v Kramer*, 334 U.S. 1 (1948). The Court in *Sipes* again considered whether an out-of-state affidavit could be used in a Michigan court proceeding where that affidavit was not accompanied by a certificate signed by the clerk of a court attesting to the notary's authority. The Court in *Sipes* Court reiterated its ruling in *Reid* and held that such certification was unnecessary following Michigan's adoption of the Uniform Acknowledgment Act:

> The signature of one of the property owners was acknowledged before a notary public in Indiana. There is no certificate of the clerk of a court of record or the secretary of state of Indiana attached showing that the notary public who executed the acknowledgment had authority to do so on the date mentioned.
>
> Under the uniform acknowledgment act, 3 Comp Laws 1929, sec. 13333, Stat.Ann 26.604, it was held in *Reid v Rylander*, 270 Mich 263, 259 NW 630, *that such certificate was not necessary, the notary's seal of office being sufficient.*"
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> 316 Mich at 621 (emphasis added).

Over time, the National Conference of Commissioners on Uniform State Laws promulgated revised uniform acts addressed to notarial acts and the acknowledgment of affidavits taken outside of a state.[3] As explained in the commentary to the URAA, these

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[3]For example, the Uniform Acknowledgment Act, the uniform act adopted by the Michigan Legislature in 1895, was declared obsolete by the Commissioners in 1939, *see* 12 (continued...)

proposed changes in the uniform acts were made necessary by technological changes and increased mobility which made out-of-state affidavits increasingly important in American courts:

> Since its first Uniform Acknowledgment Act in 1892, the National Conference has promulgated, amended and revised acts in 1914, 1939, 1942, 1949 and in 1960. Each of these acts had a multiple purpose: *to establish a simplified and certain form for taking acknowledgments both within and without the state; and to specify how acknowledgments and other notarial acts taken out of the state could be taken so as to be recognized in the enacting state.* Each amendment or revision has been made necessary and desirable by technological changes (e.g., use of facsimile signatures); by the mobility of the American population (e.g., acknowledgment without the United States) and by changes in titles of officers, other than notaries public, who are authorized to take acknowledgments in various parts of the world."
>
> Uniform Recognition of Acknowledgment Act, Prefatory Note, 14 U.L.A., p. 233 (emphasis added).

In 1968 the Commissioners on Uniform State Laws promulgated the URAA. Shortly thereafter, Michigan became one of the first states to adopt that uniform act. In July 1969, P.A. 1969, No. 57, an act which incorporated the entirety of the URAA without alteration, was signed into law.

Michigan's version of the URAA was codified at MCL 565.21, *et seq.* Section 2 of that Act, MCL 565.262, provides a broad definition of the term "notarial acts" and outlines when these notarial acts may be performed by qualified individuals outside the State of Michigan. MCL 565.262 provides in relevant part:

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[3](...continued)
U.L.A. p. 1, and an amended version of that act was proposed for adoption.

As used in this act:

(a) "Notarial Acts" means acts that the laws of this state authorize notaries public of this state to perform, including the administering of oaths and affirmations, taking proof of execution and acknowledgments of instruments, and attesting documents. *Notarial acts may be performed outside this state for use in this state with the same effect as if performed by a notary public of this state by the following persons authorized pursuant to the laws and regulations of other governments in addition to any other person authorized by the laws of this state:*

(I) A notary public authorized to perform notarial acts in the place in which the act is performed.

* * *

(v) Any other person authorized to perform notarial acts in the place in which the act is performed..."

MCL 565.262 (emphasis added).

Section 3 of the URAA, MCL 565.263, provides that if a notarial act is performed in another state by a notary authorized to perform such acts in his/her state, the signature and title of that person constitutes sufficient proof of authority and *additional certification of the notary's authority is not required.* MCL 565.263(1) states:

(1) If the notarial act is performed by any of the persons described in subdivisions (a) to (d) of [MCL 565.262] other than a person authorized to perform notarial acts by the laws or regulations of a foreign country, *the signature, rank or title and serial number, if any, of the person are sufficient proof of the authority of a holder of that rank or title to perform the act.* ***Further proof of his authority is not required.***"

MCL 565.263(1), (emphasis added).

There is another provision in the URAA which is of the utmost importance in addressing the error in the Court of Appeals' decision herein. That section is MCL 565.268, which provides:

> A notarial act performed prior to the effective date of this act is not affected by this act. This act provides an additional method of proving notarial acts. Nothing in this act diminishes or invalidates the recognition accorded to notarial acts by other laws of this state.
>
> *Id.*

To understand the significance of this particular section of the URAA it is necessary to return to the promulgation of this uniform law. When the Commissioners on Uniform State Laws approved the URAA in 1968, they stressed the need for uniformity among the states regarding the use of out-of-state acknowledgments. The Prefatory Note to the URAA indicated that, "a uniform act on the subject of the recognition of acknowledgments is becoming increasingly more imperative as more and more citizens of the United States are employed by the federal government and American industry away from their state of origin or property management." URAA Prefatory Note, 14 U.L.A. p. 234.

What the Commissioners in Uniform State Laws proposed in the URAA was a single set of rules regarding out of state affidavits which would apply in every state. Yet, in preparing the URAA, the Commissioners did not seek to displace all existing state law on the subject of acknowledgements signed outside the state. What the Commissioners proposed was that the URAA would be a uniform law providing for a method of authenticating affidavits *in addition to* any other methods that already existed in a particular state.

Thus, in proposing the URAA, the Commissioners advised legislatures contemplating the adoption of this uniform act that they did not need to re-examine existing statutes to determine if there were laws regarding the use of out-of-state affidavits which might be incompatible with the provisions of the URAA. Instead, the Commissioners, citing to the language contained in the second sentence of section 8 of the URAA, MCL 565.268, specifically indicated in their Prefatory Note that state legislators adopting this uniform act would *not* be required to repeal existing laws which might conflict with the URAA:

> ***This act does not require amendment of existing acknowledgment law in the state*** *unless the state chooses to make an amendment.* This act deals only with "recognition of notarial acts" and ***it is a recognition statute "in addition to any other recognition statute now in effect in the state." While as a matter of tidying-up the statute books, it may be desirable to repeal some of the existing recognition statutes such as the earlier Uniform Acknowledgment Acts, that is not necessary. This act may stand alone.***
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> 14 U.L.A. at 234 (emphasis added)[4]

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[4]The fact that the URAA was designed as an *additional* method of authenticating notarial acts was not novel. The Commissioners' 1892 Uniform Acknowledgment Act, the act which was adopted by the Michigan Legislature in 1895, operated under a similar premise. The first section of that act specified: "That *either the forms of acknowledgment now in use in this State, or the following*, may be used . . ." Similarly, when the Commissioners promulgated the 1939 version of the Uniform Acknowledgment Act, the Prefatory Note to that act also indicated that existing state law, even if that law was inconsistent with the proposed uniform act, could survive because the uniform act was designed to act as an alternative to existing law:

> It should be explained to the Legislatures that there is no attempt to repeal the existing laws on the subject but the Act proposed is merely permissive in that *an acknowledgment may be made either in the manner and form now provided by the law of the state or in the manner and form fixed by this Act.* Thus a modern, uniform Act is being proposed for adoption in those states which desire it,

(continued...)

The indication in the Commissioners' URAA's Prefatory Note that incompatible existing laws did not have to be repealed was reinforced by the work of the Michigan Law Revision Commission. The Michigan Law Revision Commission is a body charged by statute with the responsibility of reviewing proposed uniform acts and recommending to the Michigan Legislature changes in the law based on those uniform acts. *See* MCL 4.1403(1)(b), (d). In its 1968 Annual Report, the Commission recommended that the Legislature adopt the URAA. A copy of the pertinent pages of the Commission's Annual Report is attached hereto as Exhibit E. In its Report, the Law Revision Commission stressed the need for a comprehensive and uniform law on the recognition of acknowledgments. Annual Report (Exhibit E), p. 64. The Law Revision Commission also advised the Legislature that, because of the way in which the URAA was drafted, if it were enacted, it would not be necessary for the Legislature to comb through

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[4](...continued)

> without any attempt to alter or change the existing form and method in the event that form or method should be preferred over that proposed.
>
> 12 U.L.A., p. 3 (emphasis added).

The fact that these more modern uniform acts could exist side by side with pre-existing state law on the subject of acknowledgments has been discussed in several state court decisions in jurisdictions which have adopted one of the versions of these uniform acts. *See New England Bond & Mortgage Co. v Brock*, 270 Mass 107; 169 NE 803 (1930) (construing Massachusetts adoption of the 1892 Uniform Acknowledgments Act as providing that "either the forms then in use in the State might be used, or forms intended to be uniform with the laws of other States and therein set out."); *cf. First National Bank of Fulton Ky v Howard*, 148 Tenn 188; 253 SW 901 (1923) (concluding that under the 1939 Uniform Acknowledgments Act, either that uniform act or previously existing state law could be used to authenticate a notary's act); *Valley National Bank of Arizona v Avco Development Co.*, 14 Ariz App 56; 480 P2d 671, 675 (1971) (same).

existing laws to determine if there were any statutes which might be inconsistent with its provisions. Thus, the Law Revision Commission Report advised the Legislature:

> The act does not require the amendment or repeal of any existing legislation in Michigan but the old Uniform Act adopted in 1895 in Michigan should be repealed as no longer necessary. The new act covers the material contained in the older act and persons using procedures under the 1895 legislation will still be in compliance with the requirements of the new act.
>
> Annual Report (Exhibit E), p. 65.

Like the Commissioners' Prefatory Note to the URAA, the Law Revision Commission's Report advised the Michigan Legislature that, because of the way the URAA was written, existing law on the same subject, even if in conflict with the provisions of the uniform act, did not have to be repealed or amended.

The final two sentences of Section 8 of the URAA, MCL 565.268, are, therefore, of overwhelming importance in this case. These sentences convey the fact that the URAA was not meant to supplant existing state law on the subject of foreign acknowledgments. Rather, these two sentences demonstrate that the URAA was designed to provide an *alternative* method for validating notarial acts which would be consistent in every state adopting the URAA: "This act provides an additional method of proving notarial acts. Nothing in this act diminishes or invalidates the recognition accorded to notarial acts by other laws of this state." MCL 565.268.

Finally, there is one other section of the URAA which is of considerable importance in this context. Section 9 of the Act, MCL 565.269, expresses the primary good of this and any other uniform act proposed by the Commissioners on Uniform State Laws: "This act shall be so interpreted as to make uniform the laws of these states which enact it."

B. The Court of Appeals Patently Erred In Concluding That Only MCL 600.2102 Applied To This Case.

In its June 9, 2005 Opinion, the Court of Appeals began its analysis by examining the text of the URAA and MCL 600.2102. Based on that review, the Court of Appeals' majority reached the conclusion that Dr. Glick's affidavit met all of the requirements set out in the URAA, but it did not satisfy the additional certification called for by MCL 600.2102:

> *If the present inquiry were to be decided on the basis of the URAA, the notarization of the affidavit in question would indisputably be valid.* Plaintiffs' affidavit of merit bears the signature and notary seal of a Pennsylvania notary public. That status in another state carries over to this state, and the signature and title are prima facie evidence of authenticity, MCL 565.263(4). *But the signature and notary seal do not satisfy the requirements set forth in MCL 600.2102(4).*
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> Opinion (Exhibit D), p. 3 (emphasis added).

After setting out the differences in the results which would obtain under these two statutes, the Court of Appeals proceeded to find a method of "harmonizing" the two statutes. The Court of Appeals ruled that the two statutes could be "harmonized" on the following basis:

> The two statutes can be harmonized. The URAA provides in pertinent part, "Nothing in this act diminishes or invalidates the recognition accorded to notarial acts by other laws of this state." MCL 565.268. The Legislature is charged with knowledge of existing laws on the same subject and is presumed to have considered the effect of new laws on all existing laws. *Walen v Dep't of Corrections*, 443 Mich 240, 248; 505 NW2d 519 (1993); *Kalamazoo v KTS Industries, Inc.*, 263 Mich App 23, 34; 687 NW2d 319 (2004). MCL 600.2102 is a law of this state that requires more specific recognition requirements of notarial acts authenticating an affidavit of a person residing in another state that is received in judicial proceedings; *i.e.,* it requires that the signature of a notary public on an affidavit taken out of state "be certified by the clerk of any court of record in the county where such affidavit shall be taken, under seal of said court." As such,

> the URAA, enacted after MCL 600.2102, does not diminish or invalidate the more specific and more formal requirements of MCL 600.2102. Furthermore, this harmonious application of the URAA and MCL 600.2102 avoids conflict.
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> Opinion (Exhibit D), pp. 4-5.

The essence of the Court of Appeals attempt to bring harmony to these two statutes is contained in a single sentence: "In other words, MCL 565.262 governs notarial acts, including the execution of affidavits, in general, to which MCL 600.2102 adds a special certification requirement when the affidavit is to be read, meaning officially received and considered, by the judiciary." Opinion, p. 5. Thus, "harmony" to the Court of Appeals majority meant applying MCL 600.2102's requirements to any affidavit executed out-of-state which is received and considered by a judge, and that the reach of the URAA would be limited to any other situation in which an affidavit might be used.

Plaintiffs do not dispute that a court faced with potentially conflicting statutes must "endeavor to read them harmoniously and to give both statutes a reasonable effect." *House Speaker v State Administrative Bd.*, 441 Mich 547, 568; 495 NW2d 539 (1993); *People v Webb*, 458 Mich 265, 273-274; 580 NW2d 884 (1998); *Wayne County Prosecutor v Dept of Corrections*, 451 Mich 569, 577; 548 NW2d 900 (1996). Thus, plaintiffs do not contest the fact that the Court of Appeals acted properly in first attempting to harmonize these two statutes. However, it is absolutely clear that the method used by the Court of Appeals to arrive at its "harmonious" reading of these two statutes was completely wrong.

This Court has frequently stressed that potentially conflicting statutes are to be harmonized *if possible*. *Detroit Police Officers Ass'n v City of* Detroit, 391 Mich 44, 65, n. 12;

214 NW2d 803 (1974); *People v Bewersdorf*, 438 Mich 55, 68; 475 NW2d 231 (1991); *People v Webb*, 458 Mich at 274 ("If statutes lend themselves to a construction that avoids conflict, then that construction should control."); *House Speaker*, 441 Mich at 568-569. Thus, if potentially conflicting statutes can be harmonized, they should be. However, in attempting to "harmonize" two competing statutes, there are obvious constraints on a court.

This Court has made it clear that a court engaged in interpreting and applying a statute is not free to rewrite that statute. *Lesner v Liquid Disposal, Inc.*, 466 Mich 95, 101; 643 NW2d 553 (2002) (statutes are to be applied "as enacted without addition, subtraction or modification."); *Omne Financial, Inc. v Shacks, Inc.*, 460 Mich 305, 311; 596 NW2d 591 (1999). As the Court observed in *State Farm Fire & Casualty Co v Old Republic Ins Co*, 466 Mich 142, 146; 644 NW2d 715 (2002), "because the proper role of the judiciary is to interpret, not write the law, courts do not have authority to venture beyond the unambiguous text of a statute." These fundamental principles with respect to the interpretation of statutes, which are ultimately grounded in constitutional imperatives, *People v McIntire*, 461 Mich 147, 153; 599 NW2d 102 (1999); *Robertson v DaimlerChrysler*, 465 Mich 723, 758; 641 NW2d 567 (2002), must also apply where a court seeks to harmonize two statutes.

A court, engaged in an effort to harmonize two statutes does not have the authority to rewrite those statutes. *Shirilla v City of Detroit*, 208 Mich App 434, 439-440; 528 NW2d 763 (1995). Moreover, a court engaged in the process of harmonizing two statutes does not have the authority to negate the language of one of these statutes, thereby rendering any portion of that statute to be without effect. As expressed by this Court in *State Treasurer v Schuster*, 456 Mich 408, 419; 572 NW2d 628 (1998), a harmonious reading of two statutes must be accomplished

"without rendering any relevant provision surplusage or nugatory." Rather, as this Court indicated in *House Speaker*, a court striving to read two statutes harmoniously is compelled "to give both statutes a reasonable effect." 441 Mich at 568.

In "harmonizing" the URAA and MCL 600.2102 as it did, the Court of Appeals completely failed to abide by these basic principles of statutory construction. The Court of Appeals majority began its analysis by acknowledging that under the provisions of the URAA, *the affidavit of merit submitted by the plaintiffs was "indisputably" valid.* Opinion (Exhibit D), p. 3. In conceding that plaintiffs' affidavit was valid under the URAA, the majority recognized the obvious – the URAA applies to all out-of-state affidavits used in the State of Michigan, *including affidavits used in court proceedings*. Having reached this entirely correct conclusion, the majority's decision to "harmonize" these two statutes by making the URAA completely inapplicable to affidavits received and considered by a court is nonsensical. The Court of Appeals patently erred in "harmonizing" these two statutes by refusing to extend the URAA to affidavits filed in judicial proceedings *after properly concluding that this affidavit filed in a judicial proceeding was valid under the URAA.*

The Court of Appeals was apparently of the view that its initial responsibility to seek a means by which the two statutes could be harmonized meant that it had the authority to rewrite one of these statutes to "fit" the two together. The Court of Appeals majority considered itself free to adopt an erroneously constricted view of the URAA under which that statute becomes inapplicable to any affidavit filed in a judicial proceeding. But, even as the majority opinion itself acknowledged, that is *not* the statute which the Michigan Legislature enacted when it passed the URAA in 1969. To the contrary, the Michigan Legislature adopted a *comprehensive*

act designed to cover the entire field of notarial acts, including, not surprisingly, notarial acts which find their way into documents which are filed in a court proceeding.

The Court of Appeals majority's effort to "harmonize" the URAA and MCL 600.2102 was completely wrong. However, what makes the majority's decision in this case so completely mystifying is that there was a ready means of harmonizing these two statutes - *a means which was specifically dictated by the Michigan Legislature* - which the Court of Appeals simply refused to apply to this case. The Legislature provided the means for harmonizing these two statutes in the last two sentences of MCL 565.268: "This act provides an additional method of proving notarial acts. Nothing in this act diminishes or invalidates the recognition accorded to notarial acts by other laws of this state."

Plaintiffs have previously recounted the history Michigan's adoption of the URAA as it bears on the critical language contained in MCL 565.268. That history indicates that when the Michigan Legislature was considering the adoption of the URAA, it was advised by both the Prefatory Note prepared by the Commissioners On Uniform State Laws and the Michigan Law Revision Commission that the URAA was designed to set out a single, uniform means of authenticating out-of-state notarial acts which would be *in addition to* any prior laws which existed on this subject. Thus, prior to adopting the URAA, the Michigan Legislature was advised by both the Commissioners and the Law Revision Commission that *it did not have to go through existing statutes* to eliminate older laws which might be inconsistent with the requirements of URAA. These laws would continue to exist, providing *an* acceptable method for authenticating affidavits. But, as the second sentence of MCL 565.268 explicitly recognized, the URAA was designed to provide "an additional method of proving notarial acts."

The Court of Appeals' fundamental error in this case is aptly demonstrated in the Arkansas Supreme Court's decision in *Rumph v Lester-Land Co*, 205 Ark 1147; 172 SW2d 916 (1943), a decision with obvious similarities to this case. In 1943, Arkansas adopted the 1939 version of the Uniform Acknowledgments Act. That uniform act, like the URAA, indicated that it provided a method of validating out-of-state affidavits which was in addition to those previously recognized under the adopting state's laws.[5]

In *Rumph*, the Court had to consider a potential conflict between a state law which predated the Uniform Acknowledgments Act and that uniform act. One of these statutes required an additional certification while the other did not. The Arkansas Supreme Court examined the history and language of the model act and came to the conclusion that *both* statutes remained in effect and that compliance with *either* established the validity of the acknowledgment in question:

> We hold that the [the Uniform Acknowledgments Act] did not repeal, change, modify or in any way impair any law of this State; but provided only an alternative system for acknowledgments. In other words, [the Uniform Acknowledgment Act] is merely permissive. *Acknowledgments may still be taken, certified and authenticated just as heretofore; on the other hand, acknowledgments may be taken, certified and authenticated under the Uniform Acknowledgment Act . . . Two ways are open: (1) the old way; or (2) the way under Act 169 of 1943.* Either way reaches the same goal: *i.e.*, the right to be recorded.
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> 172 SW2d at 918 (emphasis added).

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[5]The pertinent language from the Commissioners' Prefatory Note to the 1939 Uniform Acknowledgments Act is reprinted in footnote 5, *supra*.

As the *Rumph* Court recognized, there was no conflict between existing law and the uniform act because, under the text of that uniform act, *both* methods for validating an acknowledgment still applied.

The Court of Appeals herein committed obvious error when it failed to apply the clear wording of MCL 565.268. The Court should have ruled that the methods for recognizing the validity of affidavits signed in another state under the URAA were in addition to those prescribed in MCL 600.2102.[6] *See Fireman's Fund Ins Co v Harold Turner, Inc.*, 159 Mich App 812, 816-817; 407 NW2d 82 (1987) (concluding that two potentially conflicting statutes could be construed harmoniously as supplementary where one of those statutes specified "In addition to any other liability imposed by this act or other law.")

The Court of Appeals in this case not only had a clear method of harmonizing the URAA and MCL 600.2102, but it had a clear method of harmonizing these statutes *which was expressly dictated by the Michigan Legislature*. The Court of Appeals seriously erred when it failed to conclude that the two statutes involved in this case did not conflict because, under MCL 565.268, *both* applied to this case and plaintiffs' affidavit should have been deemed valid under Michigan law if it satisfied *either* the URAA or MCL 600.2102.

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[6]The Prefatory Note's indication that the URAA was to be supplemental to any existing state law is entirely consistent with general Michigan law regarding the construction of potentially conflicting statutes. Michigan courts have long held that in attempting to construe competing statutes as consistent, "the courts will regard all statutes on the same general subject as part of one system *and later statutes will be construed as supplementary to those preceding them.*" *People v Buckley,* 302 Mich 12, 22; 4 NW2d 22 (1942)(emphasis added); *D.P.O.A. v City of Detroit*, 391 Mich 44, 65, n. 12; 214 NW2d 808 (1974). Thus, even without MCL 565.268's clear indication that the URAA was to supplement existing law, this Court would be compelled by general Michigan law to construe it as such.

There is, in addition, one other statutory provision which exposes the Court of Appeals' error herein. In concluding that MCL 600.2102 would alone apply to any affidavit which is offered in a court proceeding in Michigan, the Court of Appeals has dramatically reduced the scope of the URAA. Henceforth, under the decision announced by the Court of Appeals in this case, the URAA will apply only to out-of-state acknowledgments which are not used in a court proceeding. Thus, a uniform act which, by its express wording, was designed to govern *all* notarial acts performed outside the state of Michigan, will no longer apply in the one setting where such acts are most frequently employed, in court proceedings.

The Court of Appeals' determination that a uniform act passed by the Michigan Legislature in 1969 was nearly obliterated by a Michigan law which has been in existence since 1879 makes no sense whatsoever in light of the language of MCL 565.268. That determination is also directly at odds with section 9 of the URAA, MCL 565.269. That provision states: "This act shall be so interpreted as to make uniform the laws of these statutes which enact it."

The URAA has now been adopted by sixteen jurisdictions within the United States. Presumably, in each of the other jurisdictions which have adopted the URAA, that uniform act means what it says and it provides a single, consistent means of establishing the authentication of notarial acts occurring outside the state. The need for consistency in this context was expressly adopted by the Michigan Legislature when it enacted MCL 565.269. However, that expressed interest in uniformity among the states which have adopted the URAA has been completely wiped out by the Court of Appeals' decision in this case. A statute which was designed to provide a single, consistent method for validating all out-of-state affidavits has been reduced to applying only to those circumstances in which an affidavit is used other than in a judicial

proceeding. In its place, the Michigan Court of Appeals has substituted a quaint Michigan statute with provisions which are directly at odds with aspects of the URAA.

The Court of Appeals in this case completely failed to grasp the significance of MCL 565.268.[7] In its original April 19, 2005 Opinion, the Court cited the *final* sentence of that statute - "Nothing in this act diminishes or invalidates the recognition accorded to notarial acts by other laws of this state" - as *supportive* of its conclusion that MCL 600.2102 governed this case. Opinion (Exhibit C), p. 4. In arriving at this result, the Court completely failed to consider the second sentence of MCL 565.268, the sentence which expressly indicates that the URAA's provisions represented *an additional* method of validating notarial acts.

This rather stunning omission in the Court's analysis was pointed out by the plaintiffs in their motion for reconsideration, Despite that fact, in its June 9, 2005 decision on reconsideration, the Court's majority again relied heavily on the *final* sentence of MCL 565.268 to support its view that MCL 600.2102 alone governed this case, *but again the text of the majority opinion cited the third sentence of MCL 565.268 without reference to the sentence which precedes it.* Opinion (Exhibit D), p. 4.[8]

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[7]Notably, neither the April 19 nor the June 9 decision of the Court of Appeals on reconsideration contains a single mention of the other provisions of the URAA which is pertinent here, MCL 565.269.

[8]The majority opinion cited the language of MCL 525.628 which indicates that the URAA does not invalidate existing state law and coupled that citation with the observation that "the Legislature is charged with knowledge of existing laws on the same subject and is presumed to have considered the effect of new laws on all existing laws." Opinion (Exhibit D), pp. 4-5. In light of the text and the history of the URAA (which was brought to the Court of Appeals attention in plaintiffs' reconsideration motion), it is astounding that the Court of Appeals could have proceeded from this premise to the conclusion that only MCL 600.2102 applied herein.

(continued...)

In a footnote, the majority briefly addressed the dissenting judge's view that the second sentence of MCL 565.268 provided the legislatively imposed means of harmonizing these two statutes. The majority dismissed the dissent's reasoning:

> To avoid conflict and harmonize the statutes,, the dissent cites MCL 565.268, which provides that the URAA is "an additional method of proving notarial acts." But the dissent avoids citing the next sentence of the MCL 565.268, which provides "Nothing in this act diminishes or invalidates the recognition accorded to notarial acts by other laws of this state." To accept our dissenting colleague's harmonizing of the statutes would clearly diminish the requirements of MCL 600.2102.
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> Opinion (Exhibit D), p. 6, n. 2.

Thus, even while citing the language in the second sentence of MCL 565.268, the majority opinion still chose to ignore it. The majority was apparently of the view that it could disregard the unambiguous dictates of the second sentence of MCL 565.268 because of the language contained in the statute's third sentence. This is obviously wrong. These two sentences must be read together. Reading them together confirms that the URAA was not designed to supplant existing law, it was designed to provide an alternative method for recognizing out-of-state acknowledgments in addition to any other method otherwise provided under Michigan law.

Faced with two competing statutes, it is the function of a court to attempt to harmonize these statutes. *House Speaker*, 441 Mich at 568. Here, that job should have been simple in light of the fact that the Michigan Legislature expressly decreed in adopting the URAA how that

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[8](...continued)
What the text and the history of the URAA demonstrate beyond any question is that *the Michigan Legislature did, in fact, consider the effect that the URAA would have an existing law* and it concluded that the *URAA did not require the repeal of any existing inconsistent laws for the reason that the URAA was providing an additional basis for validating out-of-state affidavits.*

uniform act was to be harmonized with any law in existence when it was adopted. The Court of Appeals majority in this case seriously erred in ignoring that explicit legislative decree.[9]

III. IF THERE WERE AN IRRECONCILABLE CONFLICT BETWEEN THE URAA AND MCL 600.2102, THIS COURT

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[9]One final aspect of the majority's opinion deserves mention. The defendants argued on appeal that the placement of the URAA in Chapter 565 of the Michigan's Compiled Laws, the chapter pertaining to conveyances of real property, limited the Act's scope to such conveyances. In its April 19 decision, the Court of Appeals found support for its conclusion that MCL 600.2102 controlled in this case based on the placement of the URAA in Chapter 565. Opinion (Exhibit C), p. 4. In their motion for reconsideration, plaintiffs attacked the validity of this reasoning. On reconsideration, the majority opinion still stated, "it is well, then to note the structural placement of the two statutory schemes," Opinion (Exhibit D), p. 4, while at the same time concluding that the URAA and its requirements "are not limited to conveyances of real property." (*Id*). Plaintiffs do not know if an argument based on where the URAA is codified will resurface in this case. If it does, this argument must be rejected.

Attached hereto as Exhibit F is a copy of House Bill No. 2229, the bill which proposed Michigan's adoption of the URAA. This is the bill which, without amendment, later became codified in MCL 565.261, *et seq*. What is obvious from House Bill 2229 is that the Michigan Legislature was asked to vote on the *text* of the URAA, it *did not vote on the question of where this uniform act would be placed in the Michigan Compiled Laws after it was passed.* The decision regarding where to place an enactment within the Michigan Complied Laws is statutorily assigned to another body of state government, the Legislative Council, not the Michigan Legislature. *See* MCL 8.41. Because the codification of laws is not the function of the Legislature, that codification cannot affect the scope of any law adopted by the Legislature. *See People v Switras*, 217 Mich App 142, 146; 550 NW2d 842 (1996), ("the legislature has not delegated to...the compiler [of Michigan laws] the power to affect the application and reach of any statute.); *Mooahesh v Dept of Treasury,* 195 Mich App 551, 562; 492 NW2d 246 (1992) ("That the compilers of the law have placed a portion of 1998 P.A. 516 in the tax code and another portion in the lottery regulations is not dispositive."). Any suggestion that the *positioning* of the URAA limits its *text*, violates the most fundamental principle of statutory interpretation. This Court has admonished that where the *text* of a statute is unambiguous, "judicial construction is not permitted and the statute must be enforced as written." *Robertson v DaimlerChrysler*, 465 Mich 732, 748; 641 NW2d 567 (2002). This Court has also stressed that "courts simply lack the authority to venture beyond the unambiguous *text* of a statute." *Koontz v Ameritech Services, Inc.*, 466 Mich 304, 312; 645 NW2d 34 (2002) (emphasis added).

SHOULD GRANT LEAVE TO APPEAL TO ADDRESS HOW THAT CONFLICT SHOULD BE RESOLVED.

For reasons discussed, *supra*, the Court of Appeals was categorically wrong in the method it chose to harmonize the URAA and MCL 600.2102. The Court of Appeals was also categorically wrong in failing to harmonize the two statutes on the basis provided by the Michigan Legislature in MCL 565.268.

If, however, this Court were of the view that the two statutes were not capable of being reconciled, it would have to confront the question of how the conflict that exists in these statutes is to be resolved. Plaintiffs would suggest that this issue is also significant enough to command the full attention of the Court.

One of the reasons why this issue is of jurisprudential significance is because Michigan law bearing on the resolution of an irreconcilable conflict between statutes is not seamless. There are, instead, a number of strands of Michigan law which can be employed in resolving such conflicts. These differing strands may compel conflicting results.

For example, one of the basic interpretive tools which applies where two statutes are found to be in conflict is that the latter passed statute "must control as the more recent expression of legislative intention." *Center Line v 37th District Judges*, 403 Mich 595, 607; 271 NW2d 526 (1978). The courts of this state have frequently applied this "doctrine of last enactment" in resolving irreconcilable conflicts between statutes.[10] The Court most recently employed this

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[10]The following is a partial list of cases, spanning over 100 years, in which this Court has recognized that, where two statutes conflict, it is the most recently passed act which must control: *Old Orchard v Hamilton Mutual Ins Co.*, 434 Mich 244, 257; 454 NW2d 73 (1990); *Valentine v McDonald*, 371 Mich 138, 144; 123 NW2d 227 (1963); *Antrim County Bd. v Lapeer County Bd.*, (continued...)

doctrine two years ago in *Pittsfield Township v Washtenaw County*, 468 Mich 702, 713; 664 NW2d 193 (2003).

Obviously, if this doctrine were applied herein, the Court of Appeals' ruling would be erroneous. The statute on which the defendants rely, MCL 600.2102, has existed in its present form since 1879. The Michigan Legislature passed the URAA in 1969.

At the same time, there are other cases in which Michigan courts have resolved conflicts between statutes by determining which of the statutes is more specific, holding that the more specific applies over the general. *Imlay Township Primary School v State Board of Education*, 359 Mich 478, 485; 102 NW2d 720 (1960). It is this strand of the law which the defendants have emphasized, suggesting that MCL 600.2102 is more specific than the URAA.

Further complicating this already murky area is another line of cases on the subject of repeal by implication, which have adopted a test which in some sense the direct opposite of the general/specific method of resolving such disputes. Michigan courts have long held that the implied repeal of a statute is disfavored. *House Speaker,* 441 Mich at 562-563. Such an implied repeal is disfavored because of the overriding obligation which courts have to try to harmonize statutes which govern related areas. This Court has, however, made it clear that the repeal of an existing statute may be implied in two instances: "(1) when it is clear that a subsequent legislative act conflicts with a prior act, or (2) when a subsequent act of the Legislature clearly is

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[10](...continued)
332 Mich 224, 228; 50 NW2d 769 (1952); *People v Flynn*, 330 Mich 130, 141; 47 NW2d 47 (1951); *Attorney General v Showley*, 307 Mich 690, 697-698; 12 NW2d 439 (1943); *Metropolitan Life Ins Co. v Stoll*, 276 Mich 637, 641; 268 NW 763 (1936); *People v Marxhausen*, 204 Mich 559, 576-577; 171 NW 557 (1919); *Porter v Edwards*, 114 Mich 640, 643; 72 NW 614 (1897).

intended to occupy the entire field covered by a prior enactment." *House Speaker*, 441 Mich at 563; *Donajkowski v Alpena Power Co.*, 460 Mich 243, 253, 596 NW2d 574 (1999); *Wayne County Prosecutor v Dept. of Corrections*, 451 Mich 569, 576, 548 NW2d 900 (1996). As indicated in these cases, a later enacted "general" law, which is designed by the Legislature to occupy an entire area of the law, will hold sway over a more specific statute which conflicts with it. In this case, the URAA was designed and written as a "comprehensive" act governing all notarial acts performed in another state. *See* Law Revision Commission Annual Report (Exhibit E), p. 64.

The issue presented in this case contains yet another level of complexity in light of the fact that one of the acts involved in this case is a uniform act, one which is specifically designed to create a degree of consistency from state to state. *See* MCL 565.269. To the extent an irreconcilable conflict exists in this case between the URAA and MCL 600.2102, one of the factors which a court would have to take into account is that the URAA is a *uniform* act designed to create a consistent approach to the methods by which out-of-state acknowledgments may be used.

Plaintiffs would again stress that the decision in this case should not come down to a resolution of a conflict between the URAA and MCL 600.2102 because these two statutes can be construed harmoniously for the reasons discussed previously. But, if this case does raise the question of how an unreconcilable conflict between two statutes should be resolved, this issue should be reviewed by the Court.

IV. THIS COURT SHOULD GRANT LEAVE TO APPEAL TO CONSIDER WHETHER THE COURT OF APPEALS ERRED IN CONCLUDING THAT A PLAINTIFF WHO

FILES A MEDICAL MALPRACTICE ACTION WHICH IS ACCOMPANIED BY AN AFFIDAVIT OF MERIT WHICH DOES NOT CONTAIN THE CERTIFICATION OF THE NOTARY'S AUTHORITY CALLED FOR BY MCL 600.2102 MAY CLAIM THE TOLLING EFFECT OF MCL 600.5856(a)

After concluding the MCL 600.2102 controlled in this case, the Court of Appeals turned to the effect of plaintiffs' failure to submit the additional certification called for by that statute, "which technically rendered the affidavit of merit defective." Opinion (Exhibit D), p. 6. The Court of Appeals majority concluded that this defect rendered the entire case a nullity and that plaintiff could not claim the benefit of statutory tolling:

> In *Scarsella [v Pollack*, 461 Mich 547; 607 NW2d 711 (2000)], the Supreme Court was faced with a complete failure to file an affidavit of merit. The Court left for later decisional development the question of the appropriate legal response when a "timely filed affidavit is inadequate or defective." *Scarsella, supra* at 553. Such decisional development from this Court indicates that, "whether the adjective used is 'defective' or 'grossly nonconforming' or 'inadequate,'"where a plaintiff's affidavit failed to met the applicable statutory standards, it "was defective and did not constitute an effective affidavit," and therefore failed to support a medical malpractice complaint for purposes of tolling the statute of limitations. *Geralds v Munson Healthcare*, 259 Mich App 225, 240; 673 NW2d 792 (2003). *See also VandenBerg v VandenBerg*, 253 Mich App 658, 662; 660 NW2d 341 (2002) (unless a plaintiff has moved for a statutorily provided extension, the plaintiff may not file a medical malpractice complaint without an affidavit of merit then cure the latter deficiency by filing the affidavit after the statute of limitations has run). Consequently, plaintiffs in the instant case should not be permitted to use their belatedly filed certification of their Pennsylvania notary public to cure that defect in their otherwise timely complaint and affidavit.
>
> Opinion (Exhibit D), p. 6

The Court of Appeals erred in concluding that the appropriate sanction for the technical defect which it found in plaintiffs' affidavit of merit was the complete dismissal of this case. This error

represents another issue of significance to the law of this state which warrants review by this Court.

This Court has twice previously held that the appropriate judicial response to the submission of a complaint unaccompanied by an affidavit of merit called for by MCL 600.2912d is the dismissal of the case *without* prejudice. In both *Scarsella v Pollak*, 461 Mich 547, 551; 607 NW2d 711 (2000) and *Dorris v Detroit Osteopathic Hospital*, 460 Mich 26, 45-46; 594 NW2d 455 (1999), the Court so held. In *Scarsella*, however, the Court addressed the additional question of whether a refiled action following a dismissal without prejudice would be deemed timely where the original complaint was not accompanied by an affidavit of merit.

This issue turns on the question of whether the tolling period called for by MCL 600.5856(a) would apply in these circumstances. At the time this case was filed, MCL 600.5856(a) provided that statutes of limitations are tolled, "at the time the complaint is filed and a copy of the summons and complaint are served on the defendant."

In *Scarsella*, the plaintiff filed a medical malpractice action in September 1995, several weeks before the statute of limitations expired. The plaintiff's complaint was not accompanied by an affidavit of merit and the plaintiff did not file such an affidavit until April 1996, months after the applicable limitations period had expired. A panel of the Court of Appeals ruled that under MCL 600.2912d, a medical malpractice action would not be deemed filed unless and until an affidavit of merit is filed. *Scarsella v Pollak,* 232 Mich App 61, 64; 591 NW2d 257 (1998). Since the plaintiff in *Scarsella* did not file an affidavit of merit until after the limitations period had expired, the Court of Appeals held that the plaintiff's cause of action had to be dismissed on limitations grounds. *Id. at 64.*

On appeal, this Court adopted the Court of Appeals' ruling in *Scarsella* in its entirety. 461 Mich at 548-550. However, in doing so, the Court noted that it would supplement the Court of Appeals ruling by adding "two additional points of clarification". 461 Mich at 548. These "points of clarification" in the *Scarsella* ruling addressed the operation of the tolling provision contained in §5856(a).

This Court in *Scarsella* first reiterated the ruling which it had made previously in *Dorris, supra,* again acknowledging that dismissal *without* prejudice was the appropriate disposition of a case in which no affidavit of merit is filed with a medical malpractice complaint. *Scarsella*, 461 Mich at 551. However, after confirming that dismissal without prejudice was the appropriate sanction in these circumstances, the Court turned to the question of whether, in a refiled action following the dismissal without prejudice, the plaintiff could claim the benefit of the tolling provision contained in §5856(a) for the time period that the original case was in suit.

The plaintiff in *Scarsella* had argued that the limitations period applicable to his case was tolled by§5856(a) from September 1995, when his complaint was originally filed, until April 1996 when an affidavit of merit was first filed. This Court rejected that argument for the following reason:

> MCL 600.5856(a); MSA 27A.5856(a) provides that a period of limitation is tolled "[a]t the time the complaint is filed and a copy of the summons and complaint are served on the defendant." In the present case, the plaintiff did file and serve a complaint within the limitations period. The issue thus arises whether that filing and service tolled the limitation period, so that it still had not expired when the affidavit was filed the following spring.
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> As explained by the Court of Appeals in the opinion we are adopting today, such an interpretation would undo the Legislature's

> clear statement that *an affidavit of merit "shall" be filed with the complaint.* MCL 600.2912d(1); MSA 27A.2912(4)(1).
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> 461 Mich at 552 (emphasis added).

As explained in *Scarsella*, a medical malpractice plaintiff *must* file an affidavit of merit with the complaint. Failing to do so runs afoul of §2912d(1)'s mandate "that an affidavit of merit 'shall be filed with the complaint.'" 461 Mich at 552. Thus, the Court in *Scarsella* adopted the view that, "for statute of limitations purposes in a medical malpractice case, the mere tendering of a complaint without the required affidavit of merit is insufficient to commence the lawsuit." 461 Mich. at 549. The Court found therefore that the tolling principles contained in MCL §5856 would not apply to a medical malpractice action which was filed without the affidavit of merit required by §2912d.

On the basis of this Court's reasoning in *Scarsella,* there is no question that if plaintiffs had filed their Complaint *without* an affidavit of merit, such a filing would have been insufficient to commence a lawsuit and plaintiffs would not have recourse to the tolling provision contained in §5856(a). This Court in *Scarsella*, however, qualified its ruling in one important respect. The Court stressed that in ruling that the tolling effect of §5856(a) did not apply, it was *only* addressing the situation in which the plaintiff failed to file *any* affidavit of merit. The Court went on to rule in *Scarsella* that its holding with respect to the inapplicability of §5856(a)'s tolling provision to a medical malpractice complaint unaccompanied by an affidavit of merit would *not* apply where the plaintiff actually filed an affidavit of merit with his/her complaint, but that affidavit was later determined to be inadequate or defective:

> Today, we address only the situation in which a medical malpractice plaintiff wholly omits to file the affidavit required by

> M.C.L. §600.2912d(1); MSA 27A.2912(4)(1). In such an instance, the filing of a complaint is ineffective, and does not work a tolling of the applicable period of limitation. *This holding does not extend to a situation in which a Court subsequently determines that a timely filed affidavit is inadequate or defective.* [FN7]
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> [FN7] We do not decide today *how* well the affidavit must be framed. Whether a timely filed affidavit that is grossly nonconforming to the statute tolls the statute is a question we save for later decisional development.

461 Mich. at 553 (emphasis added).

Thus, the Court held in *Scarsella* that a plaintiff filing a medical malpractice complaint *without* an affidavit of merit could not claim §5856(a)'s tolling effect in a subsequently filed case, but it specifically indicated that this holding precluding application of the statutory tolling period "does not extend to a situation in which a Court subsequently determines that a timely filed affidavit is inadequate or defective." 461 Mich a 553. In a footnote accompanying that ruling, the *Scarsella* Court left unresolved the question of how well an affidavit had to be drafted, leaving for another day the question of whether a plaintiff who submits a "grossly nonconforming" affidavit of merit could claim §5856(a)'s tolling effect.

This Court ruled in *Scarsella* that there was a considerable difference for purposes of §5856(a) tolling between a malpractice complaint which was not accompanied by an affidavit of merit and a malpractice complaint which was filed with a defective or inadequate affidavit of merit. In the former situation, the plaintiff could not claim the benefit of §5856(a)'s tolling, in the latter situation tolling would apply. What the Court in *Scarsella* left undecided was whether an affidavit of merit which was seriously defective, *i.e.*, "grossly nonconforming", would trigger the tolling effect of §5856(a).

Following the release of this Courts' decision in *Scarsella*, the Michigan Court of Appeals has ignored the distinctions which the Court drew in that case. The clearest example of this elimination of the lines drawn by this Court in *Scarsella* is *Geralds v Munson Healthare,* 259 Mich App 225; 673 NW2d 792 (2003), the decision which the majority followed in arriving at its conclusion that plaintiffs herein had no right to the tolling period provided in §5856(a). Opinion (Exhibit D), p. 6. In *Geralds*, the Court of Appeals summarized the law developed in *Scarsella* and subsequent cases and proceeded to conflate the distinctions which this Court had drawn between a complaint filed without an affidavit of merit and a complaint accompanied by a defective or inadequate affidavit of merit. The *Geralds* Court then concluded:

> Semantics aside, whether the adjective used is "defective" or "grossly nonconforming" or "inadequate," in the case at bar, plaintiff's affidavit did not meet the standards contained in MCL 600.2912d(1) and failed to meet the express language of MCL 600.2169(1) because the affiant was a doctor with a different board certification than third-party defendant's board certification.
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> *We hold that plaintiff's affidavit was* ***defective*** and did not constitute an effective affidavit for the purpose of MCL 600.2912d(1) and, therefore, plaintiff filed a complaint without an affidavit of merit sufficient to commence a medical malpractice action.
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> 259 Mich App at 240 (emphasis added).

The Court of Appeals in *Geralds* found that an affidavit which did not comply with §2912d in *any* respect precluded the plaintiff from claiming §5856(a)'s tolling effect. The Court of Appeals in *Geralds* concluded that a *defective* affidavit of merit, no matter what that defect entails, is the legal equivalent of *no* affidavit for purposes of §5856(a). As this case aptly demonstrates, the Court of Appeals' decision in *Geralds,* not this Court's ruling in *Scarsella,* has

become the law with respect to the interrelationship between §5856(a) and the affidavit of merit requirement in medical malpractice cases. In this case, even the Court of Appeals majority was prompted to observe that the failure to include with the affidavit of merit an additional form certifying that the notary who signed the affidavit had the official status of a notary public "*technically* rendered the affidavit of merit *defective*." Opinion (Exhibit D), p. 6 (emphasis added). Despite the technical, as opposed to substantive, character of the defect in plaintiffs' affidavit, the Court of Appeals herein considered itself bound on the basis of *Gerald* to conclude that *any* defect in an affidavit foreclosed plaintiff from claiming the benefit of §5856(a)'s tolling.

The results reached by the Court of Appeals in this case and in *Geralds* cannot be harmonized with this Court's decision in *Scarsella*. This Court expressly indicated in *Scarsella* that there is a crucial distinction to be drawn for purposes of §5856(a) between a medical malpractice complaint which is not accompanied by an affidavit of merit and a complaint which is filed with an affidavit of merit which is later determined to be defective or inadequate. That distinction has been written out of existence in the Court of Appeals' decisions which have followed. *See Kirkaldy v Rim*, ___ Mich App ___; ___ NW2d ___ (2005).[11]

The Court should grant leave to appeal to clarify the reach of its decision in *Scarsella*. The Court should grant leave in this case because a distinction which this Court deemed it necessary to add in the *Scarsella* case has been written out of existence in subsequent decisions of the Court of Appeals.

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[11]The *Kirkaldy* Court further noted in its opinion that the distinctions being drawn between inadequate or defective affidavits of merit on the one hand and "grossly nonconforming" affidavits finds no support in the text of the statute at issue, MCL 600.5856(a). Indeed, that statute's tolling provision makes no mention of affidavits of merit at all.

The law as it exists in this area is in a state of considerable confusion. On the one hand, there is a decision of this Court indicating that its ruling finding §5856(a)'s holding inapplicable in a case in which no affidavit of merit is filed, "does not extend to a situation in which a Court subsequently determines that a timely filed affidavit is inadequate or defective." 461 Mich at 553. On the other hand, there are a number of Court of Appeals' decisions which, following *Geralds*, have held that a plaintiff who files a timely filed affidavit of merit which is later deemed "defective" or "inadequate" for *any* reason forfeits any claim to §5856(a)'s tolling effect. The conflict that exists between what this Court stated in *Scarsella* and the law that is presently being applied by the Michigan Court of Appeals should convince this Court to grant leave to appeal in this case.

RELIEF REQUESTED

Based on the foregoing, plaintiffs-appellants, Sue H. Apsey and Robert Apsey, Jr., respectfully request that this Court grant their cross-application for leave to appeal and give full consideration to the important legal issues presented herein. Alternatively, plaintiffs-appellants request that the Court summarily reverse the Court of Appeals' decision in this case and remand this case to the Shiawassee Circuit Court for further proceedings.

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Dated: August 17, 2005